

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2005-5548-FC

DALAYNARD D. JACKSON,

Defendant.

OPINION AND ORDER

Defendant moves to quash counts III and IV of the information and/or dismiss the information for a speedy trial violation. The People move to amend the complaint.

I

Defendant is charged with armed robbery of Cloa Ginter and Sandra Young, contrary to MCL 750.529 (count I); felony firearm, contrary to MCL 750.227b (count II); armed robbery of Nancy Brandies (count III); felony firearm (count IV); assault with a dangerous weapon against Jackie Underwood, contrary to MCL 750.82 (count V); felony firearm (count VI); and possession of a firearm by a felon, contrary to MCL 750.224f (count VII). Defendant was bound over on the charges after a preliminary examination was held on December 27, 2005, before the Hon. Michael S. Maceroni in the 41-A District Court.

The charges stem from an incident occurring on May 2, 2002, in which defendant allegedly robbed a 7-11 convenience store in Sterling Heights, Michigan, with a gun. Three witnesses testified for the People: two women who were working at the store at the time, and a customer. A fourth complaining witness, Nancy Brandies, allegedly was unable to appear due to a medical condition. Defendant called no witnesses. Defendant now seeks to dismiss the case



for a speedy trial violation, and further moves to quash the charges relating to Nancy Brandies, counts III and IV. The People, in turn, move to amend the complaint.

II

A

The Court will first consider defendant's motion to quash counts III and IV. Defendant argues the Court should quash said counts, relating to Nancy Brandies, because there is no proof or evidence that defendant took any property from her. Defendant avers that while others testified that Nancy Brandies pulled a tampon out of her pocket, there was no proof that defendant took and moved the item. Thus, defendant concludes, the "taking" element of armed robbery has not been met, and the attendant felony firearm charge must be dismissed, or, alternatively, reduced to assault with a deadly weapon since there was some testimony that he pointed the gun at Nancy Brandies.

The People initially respond that the charge is appropriate. However, in a supplemental motion to amend the information, the People assert that the charge of assault with intent to rob while armed, MCL 750.89, more properly comports with the evidence brought out at preliminary exam. Therefore, the People move to amend count III to state that defendant committed an assault with the intent to rob Nancy Brandies while he was armed, contrary to MCL 750.89. Defendant has not responded in writing to the motion to amend in this regard.

A defendant must be bound over for trial if evidence is presented at the preliminary examination that a felony has been committed and there is probable cause to believe that the defendant was the perpetrator. MCL 766.13; MCR 6.110(E); *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991). Circumstantial evidence and reasonable inferences

arising from the evidence may be sufficient to justify binding over a defendant. *People v Drayton*, 168 Mich App 174, 176; 423 NW2d 606 (1988).

Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged. *People v Vasher*, 167 Mich App 452, 456; 423 NW2d 40 (1988). This Court will not substitute its judgment for that of the examining magistrate unless an abuse of discretion is apparent. *Coddington, supra*. The standard for reviewing a decision for abuse of discretion is narrow. Generally, an abuse of discretion is found where an unprejudiced person, considering the facts upon which the decisionmaker acted, would say there is no justification or excuse for the ruling. *Killibrew v Dept of Corrections*, 237 Mich App 650, 652; 604 NW2d 696 (1999).

MCL 767.76 further provides that the court may amend an information at any time before, during, or after trial. *People v Jones*, 252 Mich App 1, 4; 650 NW2d 717 (2002). The court may permit the prosecutor to amend the information unless to do so "would unfairly surprise or prejudice the defendant." *Jones*, 4. An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. *Jones*, 4-5. If the amendment does charge a new crime, there may be a possible violation of the defendant's right to receive a preliminary examination. *Jones*, 5.

The Court is not persuaded that the district court erred in binding over on the charge of armed robbery, pertaining to Nancy Brandies, and felony firearm. Moreover, the Court is persuaded to allow the People to amend the complaint to charge assault with intent to rob while

armed. Assault with intent to rob while armed is a lesser included offense of armed robbery. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003). Hence, the Court finds defendant's right to receive a preliminary examination pertaining to this charge has not been violated.

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. *Akins*, 554. It is undisputed that the testimony established defendant pointed a gun at Nancy Brandies. Sandra Young testified that defendant demanded the lady at the register, Nancy Brandies, remove the money from her pockets. (Tr 38) Sandra Young testified that defendant pointed a gun at this customer, demanding the money, but all she had was a tampon to give him. (Tr 39) The Court is satisfied that this testimony is enough to establish assault with intent to rob while armed, and will therefore allow the amendment, in addition to the charge of felony firearm, as to this victim.

B

Next the Court will consider defendant's motion to dismiss. Here, defendant asserts he was initially arraigned on these charges on July 17, 2002, before the Hon. Stephen Sierawski in the Sterling Heights District Court. On October 19, 2002, pursuant to the People's Motion, defendant avers, the charges were dismissed without prejudice to federalize this matter. The federal court took jurisdiction over defendant by lodging a detainer on October 8, 2002. On March 25, 2003, defendant was arraigned on the federal charges. On July 15, 2003, defendant's attorney then filed a motion to dismiss the matter with prejudice, and on August 23, 2003, the Hon. Bernard Friedman dismissed the federal case without prejudice. On November 8, 2005, the state charges were re-authorized, according to the People. The People assert that defendant has

been under sentence with the Michigan Department of Corrections since October 16, 2002, for an armed robbery he committed in Wayne County on May 9, 2002.

Defendant argues that MCR 6.004(D) provides that failure to bring a case for trial against a state prisoner within 180 days requires dismissal with prejudice. Further, defendant avers, MCL 780.133 provides that failure to try a defendant who is a state prisoner within 180 days results in the Court losing jurisdiction. Defendant asserts that there was a delay in the case at bar of over 41 months, or approximately 1,230 days, from the date of the original charge to the date of preliminary exam. Defendant additionally contends, even after the federal charges were dismissed, there was a delay of 28 months, or approximately 840 days. Defendant states that the delays in this case were in no way attributable to him, that he was denied his constitutional right to a speedy trial, and that the unexplained delays are directly attributable to the People; the delay has never been adequately explained.

Plaintiff responds that time begins accruing in speedy trial calculations with the institution of formal proceedings, such as the issuance of an arrest warrant. The People contend that, here, only three months and eight days have passed since the issuance of the warrant, and therefore, the four-factor balancing test used to assess whether a defendant's right to a speedy trial has been violated is not applicable. Moreover, the People contend, even assuming a delay in excess of 180 days existed, the four-factor balancing test would still result in a finding of no unconstitutional delay, as no prejudice has been demonstrated.

Defendant argues that he was denied the right to a speedy trial in violation of MCL 780.131 and MCR 6.004(D), as well as the United States Constitution and the Michigan Constitution, US Const, Am VI; Const 1963, art 1, § 20. The trial court's decision to dismiss for

speedy trial violation is reviewed de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

First, MCL 780.131 requires that a prisoner charged with a crime in this state be brought to trial within 180 days from the time that the MDOC is notified that the charge is pending and subsequently notifies the prosecutor in question of the location of the prisoner. *People v Metzler*, 193 Mich App 541, 544; 484 NW2d 695 (1992). This period does not begin to run unless the prosecutor knows or should know that the defendant is incarcerated, or the MDOC knows or should know that a warrant, indictment, information, or complaint is pending against a person in its custody. *Metzler*, 544. The purpose of the statutory 180-day rule is to “dispose of untried charges against prison inmates so that sentences may run concurrently.” *McLaughlin, supra*, 643. Thus, the statute applies only to those defendants who, at the time of trial, are currently serving sentences in one of the state’s penal institutions, and not to individuals awaiting trial in a county jail. *McLaughlin*, 644.

Here, the Court finds the 180-day period began to run when the charges were reauthorized in December of 2005. Again, MCL 780.131 refers to “pending” charges. The instant charge has only been pending since December of 2005. Defendant presents no authority for tacking on the approximately 90 days between July 17, 2002 and October 19, 2002 (the time when he was first arraigned to the time his case was initially dismissed) to the 180-day period. The Court is persuaded that, under the plain language of the statute, the 180-day period runs from the date of the current information.

Second, the federal and state constitutions and Michigan statutory law guarantee criminal defendants a speedy trial without reference to a fixed number of days. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1. When a defendant claims a violation of this right, the trial court

must consider four factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) any prejudice to the defendant. *McLaughlin*, 644. When the delay is less than eighteen months, the defendant must prove prejudice. *McLaughlin*, 644.

Notably, the delay between dismissal and reinstatement of the charges does not itself violate defendant's right to a speedy trial, since no charges were pending against defendant during that time. *People v Boucher*, 131 Mich App 216, 219; 345 NW2d 670 (1983). However, that does not mean that the speedy trial right is inapplicable. Rather, the time between dismissal and reinstatement of the charges is not counted as part of the delay. *United States v MacDonald*, 456 US 1, 3, 9; 102 S Ct 1497; 71 LEd2d 696 (1982); *People v Rosengren*, 159 Mich App 492, 506-507; 407 NW2d 391 (1987).

The Court is not persuaded that defendant's constitutional right to a speedy trial was violated here. As previously stated, defendant was initially arraigned on July 17, 2002, and the charges were dismissed without prejudice in the state court on October 19, 2002 to federalize this matter. The federal court then took jurisdiction, and ultimately dismissed the case without prejudice on August 23, 2003. No charges were pending until this matter was reauthorized in December of 2005. Again, "the delay between the dismissal without prejudice and the reinstatement of the charge . . . should not be attributable to either side because there was no charge pending against defendant during those months." *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). Without that time attributable to the prosecution, the period between the initial arraignment until the initial dismissal (approximately four months) taken together with the reindictment in December of 2005 to the present (another five months), yields a

timeframe that is well under the eighteen-month threshold, over which defendant must prove prejudice by a delay.¹

Because the delay was less than eighteen months, prejudice is not presumed, and defendant is obligated to prove prejudice. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Defendant never attempts to demonstrate prejudice, which, again, is essential where, as here, the delay was less than eighteen months. Thus, the Court finds no violation of defendant's constitutional or statutory right to a speedy trial.

C

Finally, the Court considers the People's motion to amend the complaint. Here, the People request to amend count I, which currently pertains to both Cloa Ginter and Sandra Young. The People contend the evidence at the preliminary examination established that defendant committed an armed robbery against both cashiers. The People move to add count VIII of armed robbery against Sandra Young, and to amend count I to contain only Cloa Ginter's name. Additionally, the People seek to add Count IX, felony firearm, as to Sandra Young. Defendant has not responded with a brief.

The Court agrees that the preliminary examination testimony reveals that the elements of armed robbery are applicable to both Ginter and Young. The elements necessary to prove armed robbery are: "(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004). Each individually testified that defendant

¹ Even this is assuming that the time period between the initial arraignment and initial dismissal is to be considered for speedy trial purposes, an issue undecided in the state of Michigan. *Wickham, supra*, 110. The *Wickham* Court noted that the Sixth Circuit has considered only the constitutionality of the delay between the date the defendant was reindicted and the date he was first brought to trial. *United States v Atisha*, 804 F2d 920 (CA6 1986), cert den., 479 US 1067, 107 SCt 955, 93 LEd2d 1003 (1987).

pointed the gun at her head and told her to hand over money. Therefore, the Court is persuaded in this instance to grant the People's motion to amend count I, and to add counts VIII and IX.

III

Based on the foregoing, it is hereby

ORDERED Defendant's motion to quash counts III and IV is DENIED. It is further

ORDERED Defendant's motion to dismiss for speedy trial violation is also DENIED, and it is further

ORDERED Plaintiff's motion to amend counts I and III, and to add a count VIII and count IX, is GRANTED.

In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

SO ORDERED.

DATED:

cc: Joseph McCarthy
Steven Freers

Peter J. Maceroni,
Circuit Judge

PETER J. MACERONI
CIRCUIT JUDGE

MAY 25 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

BY: *[Signature]* Court Clerk